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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

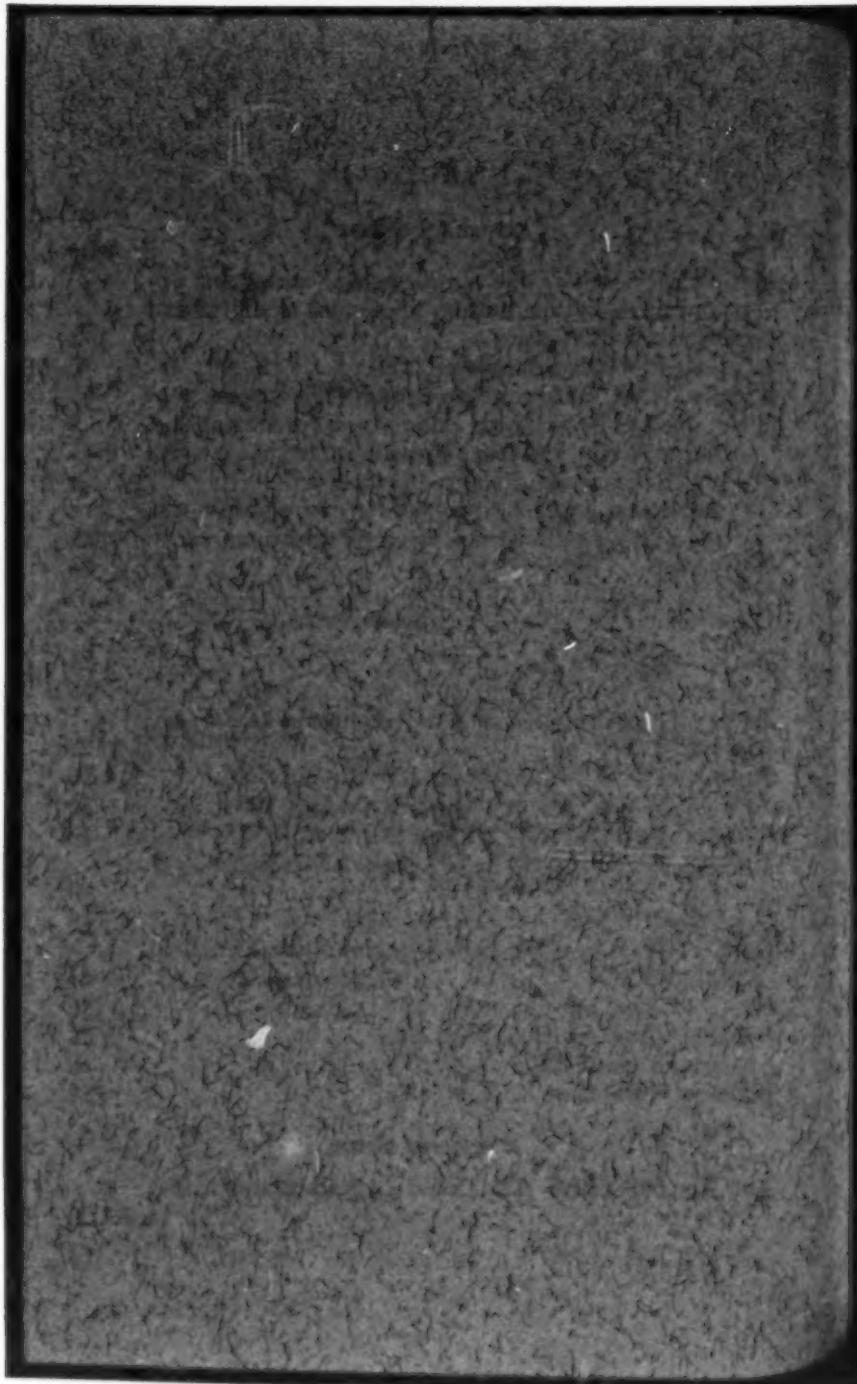
No. 259

THEOPHILE C. BOTARD AND ALLEN H. JOHNESS,
Appellants,
vs.
CITY OF NEW ORLEANS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL STATEMENT OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM AND MOTION FOR DAMAGES.

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INDEX

Subject Index

	Page
Motion for leave to file supplemental statement opposing jurisdiction, motion to dismiss or affirm and motion for damages	1
Affidavit of Walter J. Suthon, Jr.	5
Supplemental statement opposing jurisdiction, motion to dismiss or affirm and motion for damages	9
Argument on failure of appellants to comply with essential procedural requirements	9
Argument against jurisdiction and against substantiality of asserted Federal questions	11
Conclusion	20

Table of Cases Cited

Burt v. *Smith*, 203 U. S. 129	14
Calder v. *Bull*, 3 Dall. 386	15
Endicott Johnson Corporation v. *Encyclopedia Press*, 266 U. S. 285	20
Hotard v. *City of New Orleans*, 35 So. (2d) 755	16
Jackson ex dem. Hart v. *Lamphire*, 3 Pet. 280	15
Montana, ex rel. Haire v. *Rice*, 204 U. S. 291	14
Myles Salt Co. v. *Board of Commissioners*, 239 U. S. 478	19
Neblett v. *Carpenter*, 305 U. S. 297	18
Ohio, ex rel. Bryant v. *Akron Metropolitan Park District*, 281 U. S. 74	18
Opelika v. *Opelika Sewer Co.*, 265 U. S. 215	19
Smith v. *Jennings*, 206 U. S. 276	14
Soliah v. *Heskin*, 222 U. S. 522	18
Withers v. *Buckley*, 20 How. 84	15

Statutes Cited

Act No. 385 ofthe Louisiana Legislature of 1938, 11, 14, 19, 20

Page

Constitution of Louisiana:
Article XIV, Sec. 31.3 11
Article XXI, Sec. 1 ..... 11, 12, 16
Constitution of the United States, 14th Amendment 18
Coley's "Constitutional Limitations," 8th Edition, Vol. 1, p. 88 13
Rules of the Supreme Court of the United States:
Rule 10, par. 1 11
Rule 12:
Par. 1 ..... 10, 11
Par. 2 11
Par. 3 ..... 6, 7
United States Code, Title 28, Section 350 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 259

THEOPHILE O. HOTARD AND ALLEN H. JOHNESS,
Appellants,

vs.

CITY OF NEW ORLEANS, ET AL.,
Appellees

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL MOTION TO DISMISS OR AFFIRM, A SUPPLEMENTAL STATEMENT MAKING AGAINST JURISDICTION, AND A SUPPLEMENTAL MOTION FOR DAMAGES UPON DISMISSAL OR AFFIRMANCE.

To the Honorable, the Supreme Court of the United States:

Come now the Appellees:

City of New Orleans,
Chicago, St. Louis and New Orleans Railroad Company,
Gulf, Mobile & Ohio Railroad Company,
Illinois Central Railroad Company,
Louisiana & Arkansas Railway Company,
Louisville & Nashville Railroad Company,

Guy A. Thompson, Trustee; Missouri Pacific Railroad Company, Debtor,
New Orleans and Northeastern Railroad Company,
New Orleans Terminal Company,
Texas and New Orleans Railroad Company,
The Texas and Pacific Railway Company, and
Texas-Pacific-Missouri Pacific Terminal Railroad of New Orleans,

through their respective counsel, and move this Court for leave to file the attached supplemental motion to dismiss or affirm, supplemental statement making against jurisdiction, and supplemental motion for damages upon dismissal or affirmance (to which is annexed an affidavit of Walter J. Suthon made September 1, 1948) and respectfully submit as grounds for the allowance of such motion that because at the time of their filing on August 9, 1948, in the Supreme Court of Louisiana their motion to dismiss or affirm and their statement of grounds making against jurisdiction, and their motion for damages upon dismissal or affirmance there had not been filed (as required by Paragraph 1 of Rule 12 of this Court) a statement of appellants in support of jurisdiction, which document was filed on August 17, 1948, they were without information requisite for the adequate presentation to the court of the matters and things helpful to the court's consideration.

September 3, 1948.

Respectfully submitted,

HENRY G. MCCALL,
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DAVID M. WOOD,
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LOUIS G. LEMLE,
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HARRY MCCALL,
Attorney for Louisville & Nashville Railroad Company, and Texas & New Orleans Railroad Company;
LEONARD B. LEVY,
Attorney for Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, The Texas & Pacific Railway Company, and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans;
J. BLANC MONROE,
WALTER J. SUTHON, JR.,
Attorneys for New Orleans & Northeastern Railroad Company and New Orleans Terminal Company.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 259

THEOPHILE O. HOTARD AND ALLEN H. JOHNESS,
Appellants,

vs.

CITY OF NEW ORLEANS, ET AL.,
Appellees

APPEAL FROM THE SUPREME COURT OF LOUISIANA

Affidavit of Walter J. Suthon, Jr.

STATE OF LOUISIANA,
Parish of Orleans, ss:

WALTER J. SUTHON, JR., being duly sworn, deposes and says:

That he is an attorney at law and one of the attorneys of record herein for Appellees, New Orleans & Northeastern Railroad Company and New Orleans Terminal Company, and that he acted on behalf of all appellees in the matters set forth in this affidavit and in the making of this affidavit.

That following the filing in the Supreme Court of Louisiana herein on August 17, 1948, of the Statement of Appellants in Support of Jurisdiction, copies of that

jurisdictional statement were served upon appellees through their counsel by registered mail on August 19, 1948; that affiant accordingly proceeded in conjunction with other counsel for appellees to prepare for filing in the Supreme Court of Louisiana the attached Supplemental Motion of Appellees to Dismiss or Affirm and Supplemental Statement of Grounds Making Against Jurisdiction and Supplemental Motion of Appellees for Damages upon Dismissal or Affirmance, which appellees are entitled to file within fifteen days from the date of the aforesaid service upon them on August 19, 1948, under the provisions of Paragraph 3 of Rule 12 of the Rules of the United States Supreme Court; that upon the completion of the preparation of the attached Supplemental Motion of Appellees to Dismiss or Affirm and Supplemental Statement of Grounds Making Against Jurisdiction and Supplemental Motion of Appellees for Damages Upon Dismissal or Affirmance, affiant on this date, in preparation for the filing of said document with the Clerk of the Supreme Court of Louisiana, caused enquiry to be made of said Clerk as to the status of the record in this cause, and affiant was informed through said enquiry by the Clerk of the Supreme Court of Louisiana that he had delivered the record in this cause on the appeal taken by the above named appellants to Robert J. Lacey, Jr., Esquire, Counsel for said appellants, several days ago, for filing in the United States Supreme Court; that affiant accordingly did not file the attached document with the Clerk of the Supreme Court of Louisiana, since the record for this appeal had already left his custody and possession, and as affiant understands, has been filed or is now about to be filed with the Clerk of the Supreme Court of the United States; that affiant accordingly executes this affidavit for the purpose of explaining why the attached document, originally prepared for filing in the Supreme Court of Louisiana, has not been filed there, and is being

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filed in the Supreme Court of the United States, and for the purpose of fixing of record the date (August 19, 1948) upon which appellees were served herein with copies of the Statement of Appellants in Support of Jurisdiction as the date from which the period of fifteen days allowed for the filing of the attached document begins to run, under the provisions of Paragraph 3 of Rule 12 of the Rules of the United States Supreme Court.

WALTER J. SUTHON, JR.

Sworn to and Subscribed before me on this 1st day of September, 1948.

ROBERT G. POLACK,
Notary Public.

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SUPREME COURT OF LOUISIANA

No. 38833

THEOPHILE O. HOTARD AND ALLEN H. JOHNESS
Appellants,

vs.

CITY OF ORLEANS, ET AL.,
Appellees

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SUPPLEMENTAL MOTION OF APPELLEES TO DISMISS OR AFFIRM AND SUPPLEMENTAL STATEMENT OF GROUNDS MAKING AGAINST JURISDICTION AND SUPPLEMENTAL MOTION OF APPELLEES FOR DAMAGES UPON DISMISSAL OR AFFIRMANCE.

Come now the Appellees:

City of New Orleans,
Chicago, St. Louis and New Orleans Railroad Company,
Gulf, Mobile & Ohio Railroad Company,
Illinois Central Railroad Company,
Louisiana & Arkansas Railway Company,
Louisville & Nashville Railroad Company,

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor,
New Orleans and Northeastern Railroad Company,
New Orleans Terminal Company,
Texas and New Orleans Railroad Company,
The Texas and Pacific Railway Company, and
Texas-Pacific-Missouri Pacific Terminal Railroad of New Orleans,

through their respective undersigned counsel, and, following the filing herein on August 17, 1948, of the Statement of Appellants in Support of Jurisdiction, and the service of that Jurisdictional Statement on appellees on August 19, 1948, appellees now reiterate their motion to dismiss or affirm and their statement of grounds making against jurisdiction, and their motion for damages upon dismissal or affirmance, filed herein on August 9, 1948, and in further support of said motions and said statement of grounds making against jurisdiction, appellees make the following supplementary averments:

I. Argument on Failure of Appellants to Comply With Essential Procedural Requirements

The Jurisdictional Statement of appellants, which should have been filed herein upon the presentation of the petition for the allowance of the appeal on July 24, 1948, as required by Paragraph 1 of Rule 12 of the Supreme Court of the United States, was not filed until August 17, 1948, more than three weeks after the date when it should have been filed and more than three weeks after the expiration of the period of time allowed for an application for an appeal to the Supreme Court of the United States under United States Code, Title 28, Section 350.

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In addition to this tardy filing of the Jurisdictional Statement, appellants have also failed to comply with the following appeal requirements:

(a) In serving copies of their Jurisdictional Statement upon appellees, appellants have failed to serve the statement directing attention to the provisions of Paragraph 3 of Rule 12, as required by Paragraph 2 of Rule 12.

(b) Appellants have failed to append to their Jurisdictional Statement copies of the opinions in the cause sought to be reviewed, as required by Paragraph 1 of Rule 12.

(c) Appellants have not had a citation of appeal signed by the Judge or Justice allowing the appeal until August 23, 1948, thirty days after the appeal was applied for and allowed, notwithstanding the provisions of Paragraph 1 of Rule 10 that this citation shall be signed when the appeal is allowed.

II. Argument Against Jurisdiction and Against Substantiality of Asserted Federal Questions

Appellants in their Jurisdictional Statement predicate their asserted right of appeal to the United States Supreme Court chiefly upon the nebulous complaint that their Federal rights were violated by the failure of the Louisiana Supreme Court to recognize and hold that the constitutional amendment embodied in Act 385 of 1938, which became Section 31.3 of Article XIV of the Louisiana Constitution by the affirmative vote of the electorate, is invalid under the "one amendment" provision of Section 1 of Article XXI of the Louisiana Constitution. In view of the emphasis placed on this point, we shall now supplement and amplify our demonstration that this issue involves solely and exclusively questions of State law and presents no Federal question.

It is elementary that there is nothing in the Federal Constitution which requires a complex amendment to a State Constitution to be submitted to the State electorate as several separate amendment proposals, rather than as a single amendment proposal. The "one amendment" rule in Louisiana results solely from a provision of the State Constitution (Art. XXI, Sec. 1) reading as follows:

> "• • • When more than one amendment shall be submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately. • • •"

In holding that Act 385 of 1938 complied with this "one amendment" rule, the Louisiana Supreme Court said:

> "The constitutional amendment in question is really only one amendment, authorizing the city to establish and maintain one or more railroad passenger stations, and, as an incident thereto, to eliminate certain grade crossings of tracks entering the station or stations. This new section—31.3 of Article 14—is necessarily a long section because it embodies all of the details concerning the authority which was conferred upon the city. It covers nearly five pages of the Constitution; but all of its provisions relate to the one purpose of authorizing the city, acting through the Public Belt Railroad Commission, to construct, maintain and operate one or more passenger stations, and, as an incident thereto to eliminate grade crossings." (35 So. 2d. at p. 755.)

This is a determination of what is purely and simply a question of State law. The general principle that amendments to a State Constitution are matters for determination by the State, unless a provision thereby incorporated into the State Constitution would make the law of the State encroach upon a subject as to which action by the State is

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forbidden by the Federal Constitution, is stated as follows in Cooley's *Constitutional Limitations* (8th. Ed.), v. I, p. 88:

"V. The power of the people to amend or revise their constitutions is limited by the Constitution of the United States in the following particulars:

1. It must not abolish the republican form of government, since such act would be revolutionary in its character, and would call for and demand direct intervention on the part of the government of the United States.

2. It must not provide for titles of nobility, or assume to violate the obligation of any contract, or attaint persons of crime, or provide ex post facto for the punishment of acts by the courts which were innocent when committed, or contain any other provision which would, in effect, amount to the exercise of any power expressly or impliedly prohibited to the States by the Constitution of the Union. For while such provisions would not call for the direct and forcible intervention of the government of the Union, it would be the duty of the courts, both State and national, to refuse to enforce them, and to declare them altogether void, as much when enacted by the people in their primary capacity as makers of the fundamental law, as when enacted in the form of statutes, through the delegated power of their legislatures.

"VI. Subject to the foregoing principles and limitations, each State must judge for itself what provisions shall be inserted in its constitution; how the powers of government shall be apportioned in order to their proper exercise; what protection shall be thrown around the person or property of the citizen; and to what extent private rights shall be required to yield to the general good. And the courts of the State, still more the courts of the Union, would be precluded from inquiring into the justice of their action, or questioning its validity, because of any supposed conflict with fundamental rules of right or of government, unless

> they should be able to show collision at some point between the instrument thus formed and that paramount law which constitutes, in regard to the subjects it covers, the fundamental rule of action throughout the whole United States."

It is also elementary that no provision of the Federal Constitution forbids State action on the subjects covered by Act 385 of 1938—the construction and operation of a union station, the elimination of grade crossings, etc.

What appellants really seek is a review by the United States Supreme Court of the merits of the decision of the Louisiana Supreme Court that this particular constitutional amendment was submitted and adopted in valid consonance with the pertinent provisions of the Louisiana Constitution. The following decisions demonstrate that such a case involves no Federal question:—

Smith, Receiver v. *Jennings, Treasurer,* 206 U. S. 276, 278:

> "But the conformity with the state constitution of the proceedings in the enactment of the law is a question for the determination of the state court and its judgment is final. Burt *v.* Smith, 203 U. S. 129, 135; Haire *v.* Rice, 204 U. S. 291."

Burt v. *Smith,* 203 U. S. 129, 135:

> "It is argued that the Court of Appeals exceeded its functions under the constitution of the State, and in that way denied the plaintiffs due process of law. We see no reason to think so, but with that question we have nothing to do. French *v.* Taylor, 199 U. S. 274 Rawlins *v.* Georgia, 201 U. S. 638."

Montana ex rel. Haire v. *Rice.* State Treasurer, 204 U. S. 291, 301:

> "It is further claimed by the plaintiff in error that the Supreme Court of the State erred in holding that

the law under which bonds were issued and the proceeds of public lands devoted to their payment was repugnant to the constitution of the State. Upon this question the decision of that court is conclusive, and plainly we have no power to review it."

Indeed, it has been the settled jurisprudence of the United States Supreme Court from its earliest days that it possesses no power of appellate review in State Court cases involving the contention that a State enactment has violated a provision of the State Constitution. Early leading decisions to this effect are as follows:—

Calder v. *Bull*, 3 Dall. 386, 392:

"... this court has no jurisdiction to determine that any law of any state legislature, contrary to the constitution of such state, is void."

Jackson ex dem. Hart v. *Lamphire*, 3 Pet. 280, 289:

"This court has no authority, on a writ of error from a state court, to declare a state law void on account of its collision with a state constitution."

Withers v. *Buckley*, 20 How. 84, 89:—

"Nor has it been deemed the province of this court to abrogate or overrule the interpretation put upon their own respective statutes by the courts of the several states, whether such interpretation had reference to the ordinary rights of person or property, or to the nature and extent of the legislative powers vested by the constitutions of the several States, and their coincidence with acts of legislation performed under the delegation of those powers. These are functions wisely and necessarily left by this court untouched in the State tribunals, the assumption of which by the federal judiciary, as it would embrace every matter upon which the governments of the State could operate, would, in effect, amount to the annihilation of those governments."

While appellants disclaim attacking the "one amendment" provision of the Louisiana Constitution (Article XXI, Sec. 1), it is obvious that what their appeal seeks to do on this branch of the case is to have the Supreme Court of the United States substitute for the decision of the Louisiana Supreme Court, favourable to appellees on this issue of State law (see p. 755 of 35 So. 2d), the dissenting opinion of Mr. Justice Fournet, expressing a diametrically opposing view on this question of State law (see p. 762, ff., of 35 So. 2d).

Appellants in their Jurisdictional Statement concede (p. 5) that the opinion of the Louisiana Supreme Court neither recognizes nor suggests that any Federal question was involved and determined in this litigation. They emphasize, however, the reference in the dissenting opinion of Mr. Justice Fournet to "the applicable constitutional provisions and jurisprudence" (see p. 761 of 35 So. 2d). A reading of the entire dissent will show an extended discussion of several questions of State constitutional law, but no reference at all to any questions of Federal constitutional law. It is thus obvious that this dissenting jurist must have had in mind his expressed view that this constitutional amendment violated the various provisions of the State Constitution, which he sets forth at length in his dissenting opinion, and that he did not have in mind any provisions of the Federal Constitution when he spoke of "the applicable constitutional provisions." This dissenting opinion specifically enumerates the following seven provisions of the State Constitution which this dissenting jurist thought violated by the constitutional amendment in controversy:—

Article III
Article IV, Section 12.
Article VII
Article XIV, Section 14.
Article XIV, Section 24.
Article XIV, Section 26.
Article XXI, Section 1.

This dissenting opinion thus strongly corroborates our contention that the case involves only issues of State law, and affords no assistance whatever to the efforts of appellants to discover and develop a substantial Federal question as the basis for an appeal to the United States Supreme Court.

The significant and fatal weakness of the Jurisdictional Statement is the inability of appellants to cite a single decision of the United States Supreme Court, or of any other court, holding specifically that the "due process" clause of the Federal Constitution applies to the procedure for amending a State Constitution, or a single decision invalidating an amendment to a State Constitution on the specific ground that the procedure for its adoption violated the requirements of the "due process" clause of the Federal Constitution. On this major point in the effort of appellants to have the case reviewed by the United States Supreme Court, appellants can cite no pertinent decision, and their argument is simply a contention that their own illogical *ipse dixit* should be taken as the controlling authority on this question of constitutional law.

Appellants also complain of the delegation of power by the municipality to the Committee created by the contract for supervising or controlling the acquisition, construction, maintenance and operation of the Union Station. The Louisiana Supreme Court pointed out that the constitutional amendment in question specifically authorized the delegation of these powers to this Committee (see p. 758 of 35 So. 2d.).

The Jurisdictional Statement of appellants fails to show by any specific record reference any attempt to seasonably raise or even suggest a Federal question on this aspect of the case. However, even if appellants had gone through the form of seasonably asserting a Federal question on this point, that assertion would obviously have been unsub-

stantial and groundless, as appears from the following holding in *Neblett* v. *Carpenter*, 305 U. S. 297, 302:—

> "It is said that the Code does not authorize the Commissioner to delegate to a corporation organized by him powers and duties in aid of his administration of the assets of an insolvent insurance company. The state court has held such procedure is in accordance with the Code provisions.
>
> • • • • • • •
>
> All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We are, therefore, without jurisdiction to review the state court's decision of any of those questions.
>
> It is argued that the Code unconstitutionally delegates legislative functions to the Commissioner, and that the Supreme Court erred in not so holding. This, again, is a question of state law the decision of which by the State's highest court is binding upon us."

We quote as follows to the same effect from *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74, 79:—

> "It was insisted by the taxpayers, plaintiffs in the state court, that these statutory provisions involved an unconstitutional delegation of legislative power to the probate court and to the nonelective park commissioners. We do not consider it necessary to consider at length this objection, or the other points sought to be made against the statute under the Fourteenth Amendment, as, in view of the repeated decisions of this Court, we do not find any substantial Federal question presented."

In *Soliah* v. *Heskin*, 222 U. S. 522, the Court recognizes in the following language that the Fourteenth Amendment does not restrict the action of the State in establishing and

determining the method of selection of those in whom shall be vested the powers exercised under its authority in a particular locality (p. 524):—

> "The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, nor whether they shall be appointed, or elected by the people."

In view of the specific language just quoted, the contention that a Federal question arises under the Fourteenth Amendment, upon the holding of the Supreme Court of Louisiana that the contract provision for the vesting of power and authority in the Committee is fully authorized by the governing constitutional amendment, is clearly so unsubstantial as to be frivolous.

Appellants for jurisdictional purposes also rely upon *Myles Salt Company* v. *Board of Commissioners*, 239 U. S. 478, wherein the United States Supreme Court took jurisdiction of an appeal in a suit which did not attack the law of the State as written, but attacked that law as administered, and justified by the Supreme Court of the State. No such case is presented here. The instant decision of the Supreme Court of Louisiana simply holds that the contract as made by the municipality is within the scope of the authority conferred upon the municipality by the constitutional amendment embodied in Act 385 of 1938. That a question as to the extent of the contractual power of a municipality under its governing law is purely a question of State law, has been expressly recognized in the following language in *Opelika* v. *Opelika Sewer Co.*, 265 U. S. 215, 217:

> "There can be no question that the instrument purported to be a contract and that if it was a valid one it bound the Sewer Company not to charge more than the prescribed rates. *Columbus Ry., Power & Light Co., v. Columbus*, 249 U. S. 399. Whether it was valid

under the laws of Alabama belongs to the Supreme Court of the State to decide."

What this suit really attacks is the policy of the State in adopting the constitutional amendment (Act 385 of 1938), authorizing these works of great public improvement, and the policy of the municipality in entering into the contract with the railroads which the State Supreme Court has held authorized by the constitutional amendment. It is well settled that such questions of policy raise no Federal question. We quote as follows to this effect from *Endicott Johnson Corporation* v. *Encyclopedia Press*, 266 U. S. 285, 290:

> "It is further contended that this section of the Code is void because contrary to public policy. This, however, does not present a federal question."

III. Conclusion

Upon our original presentation as now supplemented, we again submit that the appeal should be dismissed, or alternatively, the judgment from which the appeal is taken should be affirmed, in either instance with an award of substantial damages against appellants for taking a dilatory appeal on frivolous and unsubstantial grounds.

September 1st, 1948.

Respectfully submitted,

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